Supreme Court, U.S.
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No. 04-

In the Supreme Court of the United States

ILLINOIS, PETITIONER,

v.

MICHELLE L. BARTELS, RESPONDENT.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN*
Solicitor General
LINDA D. WOLOSHIN
ANDERSON M. GANSNER
Assistant Attorneys General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

Counsel for Petitioner

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibits a police officer, during a lawful traffic stop, from asking the motorist a question unrelated to the traffic violation that justified the stop.

2. Whether the *Terry* doctrine governs police investigatory conduct during a lawful traffic stop justified by probable cause, where the investigatory conduct is unrelated to the traffic violation that justified the stop.

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PETITION FOR A WRIT OF CERTIORARI

The State of Illinois respectfully petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois in this case.

OPINIONS BELOW

The order of the Supreme Court of Illinois (App. 1a) denying the State's petition for leave to appeal will be reported at ___ Ill. 2d ___, ___ N.E.2d ___ (2004). The order of the Appellate Court of Illinois, Third District (App. 2a-14a), is unreported.

JURISDICTION

The Appellate Court of Illinois entered judgment on May 27, 2004. The Supreme Court of Illinois denied the State's petition for leave to appeal on October 6, 2004. On December 28, 2004, Justice Stevens extended until February 3, 2005, the time within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Respondent was charged with drug offenses and filed a motion to suppress, arguing that the search of her vehicle during a traffic stop violated the Fourth Amendment. The state trial court granted the motion, and the Illinois Appellate Court affirmed. Adhering to settled Illinois precedent, the appellate court held that the police officers exceeded the permissible scope of the traffic stop when they asked respondent whether she had anything illegal in her car.

1. On June 21, 2002, Illinois State Police Officer Brad Sprague was directing traffic at an accident scene. As an SUV passed, the driver honked his horn and indicated that his car had just been hit by another car, a Cavalier. Both vehicles pulled over to the side of the road. While approaching the two vehicles, Sprague noticed that the man whom he had seen driving the Cavalier had moved to the passenger seat. Respondent was in the driver's seat. App. 3a.

Officer Sprague told the previous driver, Zaloudek, to exit the car, and asked him why he had switched places with respondent. Zaloudek eventually admitted that he had been driving during the accident and that his driver's license had been revoked. Zaloudek told Sprague that he had another form of identification in respondent's purse. Sprague told Zaloudek that he was going to be arrested for driving with a revoked license, and asked him to wait while his identity was verified. *Ibid.*

Officer Sprague moved to the driver's side of the car, where he asked respondent for Zaloudek's identification. Respondent looked in her purse but could not find it. Sprague asked for and received permission to look inside respondent's purse, but could not find the identification. Sprague then asked if there was anything illegal in the car. Respondent said "No." *Id.* 3a-4a.

At that point, Officer Sprague received a call from dispatch requesting his status. By that time, Illinois State Police Officer Chad Brody had arrived at the scene with a trained canine, although Sprague had not called for either backup or the canine. Sprague returned to his squad car to radio a report and instructed Brody to monitor Zaloudek. *Id.* 4a.

Officer Brody then approached the Cavalier. Respondent told Brody that she had rented the car. Brody asked for the rental agreement, but respondent could not find it and said that she must have left it at home. Brady asked respondent to look in the car's central console. Respondent did not respond and her hands began to shake. Officer Brody then asked respondent if there was anything in the car he should know about, to which respondent replied "No." Officer Brody then brought his canine to the car, where it alerted to the presence of drugs. The two officers the recovered cocaine and heroin from the center console. *Id.* 4a-5a.

2. After being charged with drug offenses, respondent filed a motion to quash her arrest and suppress evidence on Fourth Amendment grounds. App. 2a. The state trial court granted the motion, reasoning that the officers' questions (regarding whether there was anything illegal in the car) were not supported by reasonable suspicion, and that any suspicion they had about drugs was not reasonably related to the initial purpose of the stop. *Id.* 5a.

3. The Illinois Appellate Court affirmed. App. 2a-14a. The court found that the stop was initially justified by the need to investigate the traffic accident. *Id.* 8a. The court determined that Officer Sprague had probable cause to question Zaloudek about the status of his driver's license and to ask respondent for Zaloudek's identification. *Ibid.* The court found, however, that Sprague violated the Fourth Amendment by asking respondent if there was anything illegal in the car. *Id.* 8a-9a.

In so holding, the court relied on the Illinois Supreme Court's decision in *People v. Gonzalez*, 204 Ill. 2d 220, 789 N.E.2d 260 (2003). App. 8a. *Gonzalez* sets forth a three-part inquiry, derived from *Terry v. Ohio*, 392 U.S. 1 (1968), to determine whether police questioning during a traffic stop violates the Fourth Amendment. First, the court determines if the question was "reasonably related to the purpose of the stop." If yes, the question was permissible. If not, the court then ascertains whether the officers had "a reasonable, articulable suspicion" to justify the question. If there was reasonable suspicion, the question was permissible. If there was no reasonable suspicion, the court then considers whether the question "impermissibly prolonged the detention or changed the nature of the stop." If yes, a Fourth Amendment violation has occurred, but if not, the question was permissible. *Ibid.*

Applying the *Gonzalez* framework, the appellate court found that Officer Sprague's questions about whether there were illegal materials in the car was "not reasonably related" to the accident investigation. App. 8a-9a. The court further found that the circumstances did not provide Sprague with a reasonable suspicion that respondent possessed drugs. *Id.* 9a. Finally, the court held that Sprague's questions "changed the fundamental nature of the stop," thus violating the Fourth Amendment. *Ibid.*

The court then turned to Officer Brody's questions and reached a similar result: he lacked reasonable suspicion to ask questions unrelated to the accident investigation, and his questions "expanded the scope of this investigation well beyond the initial purpose of the stop" in violation of the Fourth Amendment. App. 9a-11a. For these reasons, the court affirmed the trial court's granting of respondent's motion to suppress. *Id.* 11a.

Justice Schmidt dissented. He concluded that the circumstances created a reasonable suspicion of criminal activity, thus

allowing the officers to expand the scope of their inquiry. App. 11a-14a.

4. The Illinois Supreme Court denied the State's petition for leave to appeal. App. 1a.

REASONS FOR GRANTING THE PETITION

Courts across the Nation have long been deeply split over whether the Fourth Amendment prohibits a police officer, during a lawful traffic stop, from asking questions unrelated to the justification for the stop — such as whether the motorist has contraband in the vehicle. Consistent with settled Illinois Supreme Court precedent, the court below held that the police must have reasonable suspicion that contraband is present before asking such questions. That holding, in addition to reflecting an intractable split among the lower courts, is incorrect. Because mere questioning is not a search or seizure, asking questions during a valid traffic stop does not violate the Fourth Amendment. Put another way, a Fourth Amendment non-event (here, asking the motorist whether there is anything illegal in her car) cannot possibly violate the Fourth Amendment even if conducted during a legitimate traffic stop. See *Illinois v. Caballes*, 543 U.S. ___ (2005).*

This Court should grant certiorari to provide uniformity on this important and recurring question, and also to resolve the closely related matter — itself the subject of a deep and intractable split — of whether *Terry* principles govern police investigatory conduct during a lawful traffic stop justified by

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* The Illinois Appellate Court did not consider whether the canine sniff of respondent's car violated the Fourth Amendment. In any event, because the sniff occurred during the course of the traffic stop, it did not violate the Fourth Amendment. See *Illinois v. Caballes*, 543 U.S. ___ (2005).

probable cause, where the investigatory conduct is unrelated to the traffic violation that justified the stop.

I. This Court Should Resolve Whether The Fourth Amendment Prohibits Police, During a Lawful Traffic Stop, From Asking The Motorist Questions Unrelated To The Traffic Violation That Justified The Stop.

A. The Lower Courts Are Deeply and Intractably Split on the Question Presented.

Before the court below decided this case, numerous state courts of last resort and federal courts of appeals had considered the extent to which (if any) the Fourth Amendment prohibits police from asking a lawfully seized motorist questions unrelated to the traffic violation that justified the traffic stop. This issue most often arises when the officer asks the motorist whether there is any contraband (drugs or guns) in the vehicle. The lower courts have reached conflicting results and remain hopelessly deadlocked.

At one end of the spectrum, some courts have held that a police officer who makes a probable cause-based traffic stop needs no independent justification to ask the motorist whether there is any contraband in the vehicle. See *State v. Akuba*, 686 N.W.2d 406, 415-417 (S.D. 2004); *United States v. Burton*, 334 F.3d 514, 518-519 (6th Cir. 2003), cert. denied, 540 U.S. 1135 (2004); *United States v. Childs*, 277 F.3d 947, 950-954 (7th Cir.) (*en banc*), cert. denied, 537 U.S. 829 (2002); *State v. Middleton*, 43 S.W.3d 881, 885 (Mo. App. 2001); *State v. Parkinson*, 135 Idaho 357, 362-363, 17 P.3d 301, 306-307 (App. 2000); *State v. Gaulrapp*, 207 Wis. 2d 600, 606-609, 558 N.W.2d 696, 699-700 (App. 1996), rev. denied, 208 Wis. 2d 213, 562 N.W.2d 603 (1997); *United States v. Shabazz*, 993 F.2d 431, 436-437 (5th Cir. 1993).

At the opposite end of the spectrum, other courts have held that the Fourth Amendment prohibits an officer from asking the motorist about contraband unless the officer has reasonable suspicion that contraband is present. See *United States v. Holt*, 264 F.3d 1215, 1230 (10th Cir. 2001) (*en banc*); *United States v. Murillo*, 255 F.3d 1169, 1174 (9th Cir. 2001), cert. denied, 535 U.S. 948 (2002); *State v. Gibbons*, 248 Ga. App. 859, 863-864, 547 S.E.2d 679, 682 (2001); *State v. Taylor*, 126 N.M. 569, 575-577, 973 P.2d 246, 252-254 (App. 1998), cert. denied, 126 N.M. 534, 972 P.2d 353 (1999); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994), cert. denied, 514 U.S. 1134 (1995).

Still other courts, including the Illinois state courts, have adopted an intermediate approach, which asks whether the officer's question "impermissibly prolonged the [traffic stop] or changed the fundamental nature of the stop." *People v. Gonzalez*, 204 Ill. 2d 220, 235, 789 N.E.2d 260, 270 (2003) (citing *Holt*, 264 F.3d at 1240 (Murphy, J., concurring in part and dissenting in part)); accord, *State v. McKinnon-Andrews*, 151 N.H. 19, 846 A.2d 1198, 1202-1203 (2004) (adopting *Gonzalez* approach). The court below followed this intermediate approach. App. 8a (citing *Gonzalez*).

This conflict is intolerable, particularly in Illinois, where the outcome of particular cases depends entirely upon whether a crime is prosecuted in state or federal court. The Seventh Circuit in *Childs*, sitting *en banc*, held that the Fourth Amendment does not require police officers to have reasonable suspicion that contraband is present before asking motorists about contraband during a traffic stop. See 277 F.3d at 950-954. Just over a year later, the Illinois Supreme Court in *Gonzalez* expressly rejected *Childs*, holding that Illinois state courts would impose more stringent Fourth Amendment limits on such questioning. See 204 Ill. 2d at 229-235, 789 N.E.2d at 266-270.

Thus, had this case been commenced, not by the State of Illinois in the Circuit Court of Grundy County, but by the United States in the District Court for the Northern District of Illinois, the Fourth Amendment analysis would have been governed by the Seventh Circuit's *en banc* opinion in *Childs*, not by the Illinois Supreme Court's opinion in *Gonzalez*, and respondent's suppression motion would have been denied, not granted. Compare *Childs*, 277 F.3d at 950-954 (holding that police questioning unrelated to purpose of traffic stop does not violate Fourth Amendment), with App. 8a-11a (applying *Gonzalez* and holding that police questioning unrelated to purpose of traffic stop violates Fourth Amendment); *People v. Leigh*, 341 Ill. App. 3d 492, 496-497, 792 N.E.2d 809, 812-813 (2003) (same); *People v. Lomas*, 349 Ill. App. 3d 462, 469-471, 812 N.E.2d 39, 44-46 (2004) (same). The fact that the outcome of Fourth Amendment challenges in this context depends upon whether the case proceeds in federal or state court presents a textbook example of a certworthy split. See R. STERN, ET AL., SUPREME COURT PRACTICE 226 (8th ed. 2002) ("A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.").

The lower courts themselves have recognized that they are deeply divided over whether and, if so, to what extent the Fourth Amendment limits police questioning at traffic stops about contraband (or other matters unrelated to the traffic violation that justified the stop). See, *e.g.*, *McKinnon-Andrews*, 846 A.2d at 1202-1203 (recognizing split and choosing sides); *Gonzalez*, 204 Ill. 2d at 228-235, 789 N.E.2d at 266-270 (same); *Childs*, 277 F.3d at 951-954 (same); see also *United States v. Purcell*, 236 F.3d 1274, 1279-1280 (11th Cir.) (recognizing split, but not choosing sides), cert. denied, 534 U.S. 830 (2001); *Lockett v. State*, 747 N.E.2d 539, 542-543 (Ind. 2001) (same). Commentators likewise have recognized the impor-

tance of the issue and the split of authority. See Lawrence, *The Scope Of Police Questioning During A Routine Traffic Stop: Do Questions Outside The Scope Of The Original Justification For The Stop Create Impermissible Seizures If They Do Not Prolong The Stop?*, 30 FORDHAM URB. L.J. 1919, 1920 (2003) (issue arises "frequently"); Vazquez, *"Do You Have Any Drugs, Weapons, Or Dead Bodies In Your Car?" What Questions Can A Police Officer Ask During A Traffic Stop*, 76 TUL. L. REV. 211 (2001).

In sum, the conflict over whether and, if so, to what extent the Fourth Amendment prohibits police officers at lawful traffic stops from asking questions unrelated to the traffic violation that justified the stop is important, deep, intractable, and ripe for consideration. This case, which exemplifies and implements the position taken by the Illinois state courts, presents an ideal vehicle for the Court to resolve that question.

B. The Fourth Amendment Does Not Require Police To Have Reasonable Suspicion That Contraband Is Present Before Asking Questions About Contraband During A Traffic Stop.

The Fourth Amendment requires that every search or seizure be "reasonable," which typically requires "individualized suspicion of wrongdoing." *Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). This Court, however, has long recognized that "mere police questioning does not constitute a seizure," and therefore may be undertaken without individualized suspicion. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Thus, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen." *Ibid.*

When a motorist is temporarily seized at a traffic stop, mere questioning does not effect an incremental search or seizure, and therefore does not violate the Fourth Amendment. See *Childs*, 277 F.3d at 951. A contrary conclusion would lead to an anomaly — officers could not ask motorists detained at a traffic stop questions unrelated to the violation that prompted the stop, but could ask any questions of persons not in custody, see *Bostick*, 501 U.S. at 434, and questions unrelated to the charged offense of persons in formal custody, see *Texas v. Cobb*, 532 U.S. 162 (2001). Nothing in this Court's precedents supports such a distinction.

This Court's recent decision in *Illinois v. Caballes*, *supra*, confirms the point. *Caballes* considered whether the Fourth Amendment requires reasonable suspicion to justify using a drug-detection dog to sniff the exterior of a vehicle during a lawful traffic stop. *Id.*, slip op. at 2. The Court held that no reasonable suspicion was required, explaining that because the dog sniff did not "infringe[] [the motorist's] constitutionally protected interest in privacy," the sniff did not "change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." *Id.*, slip op. at 3. Because the officers did not extend the duration of the traffic stop to facilitate the dog sniff, *id.*, slip op. at 2-3, the Court ruled that no Fourth Amendment violation had occurred, *id.*, slip op. at 5.

Like the dog sniff in *Caballes*, the officers' questions of respondent did not constitute an independent search or seizure and therefore did not infringe her constitutionally protected privacy interests. See *Bostick*, 501 U.S. at 435. And as in *Caballes*, the state court in this case did not find that the officers extended the duration of the stop to facilitate their questioning. App. 9a. Accordingly, the officers' questions did not violate the Fourth Amendment.

II. This Court Should Resolve Whether The *Terry* Doctrine Governs Police Investigatory Conduct During A Lawful Traffic Stop Justified By Probable Cause, Where The Investigatory Conduct Is Unrelated To The Traffic Violation That Justified The Stop.

The conflict over the Fourth Amendment validity of questioning motorists about matters unrelated to the violation that justified the traffic stop reflects, and in large measure mirrors, a deeper methodological split over whether the *Terry* doctrine governs police investigatory conduct during a lawful traffic stop justified by probable cause, where the investigatory conduct is unrelated to the traffic violation that justified the stop. This split provides an independent ground for granting certiorari.

The Illinois Appellate Court's analysis in this case adheres to a long line of Illinois precedent that uses *Terry* to evaluate the validity of unrelated police investigatory conduct at probable cause-based traffic stops. See *People v. Caballes*, 207 Ill. 2d 504, 508-509, 802 N.E.2d 202, 204 (2003), rev'd sub. nom, *Illinois v. Caballes*, 543 U.S. ___ (2005); *People v. Harris*, 207 Ill. 2d 515, 522-524, 802 N.E.2d 219, 225 (2003), pet. for cert. pending, No. 03-1224; *People v. Bunch*, 207 Ill. 2d 7, 13-14, 796 N.E.2d 1024, 1029 (2003), cert. denied, 124 S. Ct. 1712 (2004); *Gonzalez*, 204 Ill. 2d at 228, 789 N.E.2d at 266 (declining to "distinguish between those cases in which the traffic stop is based on *Terry*'s 'articulable suspicion' and those cases in which the traffic stop is supported by probable cause," and holding that "*Terry* principles apply even in the presence of probable cause"); *People v. Gonzalez*, 184 Ill. 2d 402, 420-422, 704 N.E.2d 375, 384 (1998), cert. denied, 528 U.S. 825 (1999).

Several other state and federal courts use the same approach. See, *e.g.*, *Barch v. State*, 92 P.3d 828, 831-832 (Wyo. 2004); *Holt*, 264 F.3d at 1230; *Purcell*, 236 F.3d at 1277; *United States v. Wellman*, 185 F.3d 651, 655-656 (6th Cir.

1999); *State v. Dickey*, 152 N.J. 468, 476, 706 A.2d 180, 184 (1998). See also *Mena v. City of Simi Valley*, 332 F.3d 1255, 1264 (9th Cir. 2003) (holding, without express reference to *Terry*, that "an INS agent must have a *particularized reasonable suspicion* that an individual is not a citizen to interrogate that individual regarding his citizenship" during seizure incident to executing search warrant on a home) (emphasis in original), cert. granted sub nom., *Muehler v. Mena*, 124 S. Ct. 2842 (2004).

Other courts, including the Seventh Circuit, have expressly rejected the view that the *Terry* doctrine governs unrelated investigatory conduct that occurs during a traffic stop justified by probable cause. See, *e.g.*, *United States v. Garcia*, 376 F.3d 648, 650 (7th Cir. 2004) ("it is inappropriate to treat investigations following traffic stops as governed by *Terry*, when the stop rests on probable cause to believe that an offense has been committed"); *Childs*, 277 F.3d at 952-954; *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 647-648 (8th Cir. 1999) (refusing to apply *Terry* doctrine to traffic stop predicated on probable cause: "A traffic stop is not investigative; it is a form of arrest, based upon probable cause that a penal law has been violated."), cert. denied sub nom., *Alexander v. United States*, 528 U.S. 1161 (2000).

Two recent decisions from the Minnesota Supreme Court reflect the ongoing confusion in this area of the law. Three years ago, Minnesota aligned itself with those jurisdictions holding that "*Terry* principles are appropriately applied * * * when a motor vehicle is stopped for a routine equipment violation." *State v. Wiegand*, 645 N.W.2d 125, 133 (Minn. 2002). The Minnesota court (*id.* at 134) did so on the strength of *Berkemer v. McCarty*, 468 U.S. 420 (1984). The question in *Berkemer* was whether roadside questioning of a motorist detained at a traffic stop constitutes "custodial interrogation" under *Miranda*. *Id.* at 423. In the course of ruling that such

motorists are not "in custody" for *Miranda* purposes, *Berkemer* observed that "the usual traffic stop is more analogous to a so-called '*Terry* stop' than to a formal arrest." *Id.* at 439 (citation omitted). Based upon this language, the Minnesota court concluded that *Terry* governs police action at all traffic stops. *Wiegand*, 645 N.W.2d at 133-134. Accord, *e.g.*, *Wellman*, 185 F.3d at 656 (citing *Berkemer* for the same proposition); *Gonzalez*, 184 Ill. 2d at 421-422, 704 N.E.2d at 384 (same).

The Minnesota Supreme Court revisited this issue in *State v. Askerooth*, 681 N.W.2d 353 (Minn. 2004). *Askerooth* presented typical facts — the defendant was pulled over for committing a traffic violation; events during the stop revealed that the defendant possessed illegal drugs; and the defendant unsuccessfully moved to suppress the drugs on the ground that the officer's actions violated the Fourth Amendment. *Id.* at 356-359. The Minnesota court recognized that its prior decision in *Wiegand*, as well the Illinois Supreme Court's decision in *Gonzalez* and the Tenth Circuit's *en banc* decision in *Holt*, had held that "the *Terry* analysis applies *irrespective* of whether a stop for a minor traffic offense is based on reasonable suspicion or supported by probable cause." *Id.* at 360 (emphasis in original).

Two considerations, however, prompted the Minnesota court to reconsider that holding. First, the court recognized that *Berkemer* had qualified the analogy it had drawn between traffic stops and *Terry* stops:

> "[n]o more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop."

Id. at 360 (quoting *Berkemer*, 468 U.S. at 439 n.29). This qualification, the Minnesota court suggested, cast doubt on whether the *Terry* doctrine governs investigatory conduct at traffic stops justified by probable cause. *Ibid.* Accord, *Childs*, 277 F.3d at 953 ("although traffic stops usually proceed like *Terry* stops, the Constitution does not require this equation" for stops justified by probable cause) (citing *Berkemer*, 468 U.S. at 439 n.29).

Second, the Minnesota court noted that "[w]hether *Terry* can still be applied to traffic stops supported by probable cause is uncertain in light of" *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). *Askerooth*, 681 N.W.2d at 360. *Atwater* held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." 532 U.S. at 354. The Minnesota court interpreted *Atwater* as "remov[ing] Fourth Amendment reasonableness limitations from even a 'very minor' traffic stop when the stop is supported by probable cause." *Askerooth*, 681 N.W.2d at 361 (quoting *Atwater*, 532 U.S. at 354). Given its view of *Atwater*, and citing the Seventh Circuit's *en banc* decision in *Childs*, the Minnesota court declared itself "uncertain that *Terry* principles still apply to a court's determination whether a seizure during such a traffic stop can be unreasonable under the Fourth Amendment." *Ibid.*

There are other reasons, not cited by the Minnesota Supreme Court in *Askerooth*, to conclude that *Terry* does not govern unrelated investigatory conduct at traffic stops supported by probable cause. The *Terry* doctrine requires that *Terry* stops — which need only be justified by reasonable suspicion — have a limited duration and not "resemble a traditional arrest." *Hiibel v. Sixth Judicial Dist. Ct.*, 124 S. Ct. 2451, 2458 (2004). By contrast, as *Atwater* teaches, if there is probable cause to believe that a driver has committed a minor

traffic offense, a police officer "may, without violating the Fourth Amendment, arrest the offender." 532 U.S. at 354; see also *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001). In this most fundamental sense, a traffic stop supported by probable cause is not a *Terry* stop. It would erode the important distinction between the two types of seizures to apply *Terry* principles, which impose stringent limits on the scope and duration of a seizure, to traffic stops justified by probable cause.

Another difference lies in the distinct modes of analysis applied to *Terry* stops, on the one hand, and traffic stops justified by probable cause, on the other. The validity of *Terry* stops, and of police conduct occurring at such stops, depends upon a fact-specific balancing of "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *United States v. Hensley*, 469 U.S. 221, 228 (1985); see also *Hiibel*, 124 S. Ct. at 2459-2460. As this Court has made clear, such fact-specific balancing is inappropriate when determining the validity of traffic stops supported by probable cause and of police conduct at such stops. See *Atwater*, 532 U.S. at 354-355; *Whren v. United States*, 517 U.S. 806, 817-819 (1996); see also *Hensley*, 469 U.S. at 236-237 (Brennan, J., concurring). In this sense as well, the *Terry* doctrine is fundamentally incompatible with traffic stops justified by probable cause.

Again, the point is confirmed by *Caballes*. The Illinois Supreme Court in *Caballes* applied *Terry* to evaluate the Fourth Amendment validity of a canine sniff that occurred during a probable cause-based traffic stop. See *Caballes*, slip op. at 1-2 (Ginsburg, J., dissenting) (citing *Caballes*, 207 Ill. 2d at 508, 802 N.E.2d at 204). Justice Ginsburg would have adopted the *Terry* approach, see *id.*, slip op. at 3-5 (citing, *e.g.*, *Berkemer v. McCarty*, *supra*), but recognized that the Court had "implicitly" rejected that approach, *id.*, slip op. at 4.

As Justice Ginsburg correctly ascertained, the Court's analysis in *Caballes* rejected *Terry*, and instead rested upon the following principle — when a motorist is properly seized at a lawful traffic stop, the officer may conduct additional investigatory activities during the stop so long as those activities do not effect an incremental search or seizure. The Court should take the opportunity in this case to make explicit what is apparent, albeit implicit, in *Caballes*.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, because the Illinois Appellate Court's opinion is fundamentally incompatible with the principles set forth in *Illinois v. Caballes*, *supra*, the judgment below should be vacated and remanded for reconsideration in light of *Caballes*.

Respectfully submitted.

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN*
Solicitor General
LINDA D. WOLOSHIN
ANDERSON M. GANSNER
Assistant Attorneys General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

*Counsel of Record

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